No. 15729

United States Court of Appeals

For the Ninth Circuit

PLUMBERS & STEAMFITTERS UNION, LOCAL NO. 598,
Appellant,

vs.

W. C. DILLION, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Appellee, in his answering brief, as did appellant in its opening brief, divides his argument into three points, (A) Commerce, (B) Legality of the Contract, (C) Excessiveness of the Award. In this brief, we reply to appellee's brief in like order without intending to indicate in any way the order of importance.

A. COMMERCE

One of the positions now taken by appellee is that there is jurisdiction under Section 301 of the Taft-Hartley Act* (29 USCA Section 185) because the appellant Union represents employees who work for other employers in the plumbing or pipefitting business who

*Properly known as The Labor-Management Relations Act of 1947, sometimes herein referred to simply as the Act.

are engaged in commerce within the meaning of the Act. This reasoning is based upon a shallow reading of the words of Section 301 wherein it is stated "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act * * * may be brought in any district court * * * " (Subsection (a)). Appellee's argument then is: "The plumbing industry is a branch of the building trades and there is now no question but what the building trades affect interstate commerce" (Appellee's brief, page 3). Appellee emphasizes the point at page 4 by stating that the appellant has ignored "the fact that the union is a labor organization representing employees in an industry affecting commerce."

In this respect appellee's argument is in effect that since some employers of the plumbing industry affect commerce, the industry "affects commerce" within the meaning of Section 301 and therefore any union representing employees of any plumber anywhere in the United States may sue or be sued in the Federal district courts without diversity or requisite amount for breach of a collective bargaining agreement. Of course, today all "industries," if thus construed, affect commerce. For example, the pharmaceutical industry affects commerce. Under appellee's interpretation then, any union representing any clerical employee of any corner drug store would be a union "representing employees in an industry affecting commerce." Such examples could be multiplied *ad nauseum.*

Such an interpretation, of course, would at least as

to actions for breach of contract, effectually obliterate any distinction between national and local enterprises, as this court and the United States Supreme Court have held cannot be done. *N. L. R. B. v. Jones and Laughlin Steel Corporation,* 301 U.S. 1, 81 L.Ed. 893. *Fairway Foods, Inc., v. Fairway Markets, Inc.,* 227 F.2d 193.

This is particularly true since that which the Taft-Hartley Act regulates it pre-empts. *Guss v. Utah Labor Relations Board,* 353 U.S. 1, 1 L.Ed.2d 601. *Garner v. Teamsters,* 346 U.S. 485, 98 L.Ed. 228. *Weber v. Anheuser-Busch, Inc.,* 348 U.S. 468, 99 L.Ed. 546. In *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 1 L.Ed.2d 972, the Supreme Court held that Section 301 established a body of federal law to be applied by the courts. Thus to follow appellee's reasoning is to reach the inescapable conclusion that all actions for breach of contract between any union and any employer, whether the employer involved is engaged in or substantially affects interstate commerce or not must be brought in or be removable to the federal court and governed by federal law. The obliteration referred to could not be more complete.

Such an interpretation of the statute is unthinkable and unnecessary. The application of a few common rules of statutory interpretation dictate a different conclusion. In the first place, such an interpretation would pose a constitutional question: to-wit, does Congress have the power to regulate the labor relations of a given employer and a given union, in the exercise of its commerce power, simply because the union concerned represents employees of other employers in the

same or a related business who are engaged in commerce. This involves not only the measure of the Congressional power in the regulation of commerce itself, but the constitutional limits imposed by Article III of the United States Constitution relating to the jurisdiction of federal courts. That interpretation of a statute which avoids the necessity of involving a constitutional question is to be adopted. *Association v. Westinghouse Electric Co.,* 348 U.S. 437, 99 L.Ed. 510. *Guessefeldt v. McGrath,* 342 U.S. 308, 96 L.Ed. 342. Therefore, a construction which is clearly constitutional, to-wit: Congress intended to regulate collective bargaining contracts where the employer concerned or the work to be performed thereunder involve or affect interstate commerce, is to be preferred over a construction which involves a constitutional question of the power of Congress, to-wit: Congress intended to regulate any collective bargaining agreement between any employer and any union regardless of commerce of the employer concerned or the commerce of the work to be performed under the contract if the union concerned represented some employees of any employer or employers engaged in commerce.

Likewise, it is axiomatic that all parts of an act are to be given effect if possible and are to be construed together. From the declaration of policy of the Act it is clear that the act was intended to apply only to those disputes and affairs affecting commerce. In Section 1(b) of the Act, which is the "Title and Declaration of Policy" it is said in part:

> "It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe

> the legitimate rights of both employees and employers in *their relations affecting commerce.* * * * and to protect the rights of the public *in connection with labor disputes affecting commerce.*" (Emphasis supplied)

Like declarations are to be found in Section 101.

Therefore it seems abundantly clear that Congress intended in Section 301 to confer jurisdiction upon the district courts to entertain suits for violation of contract only where the employer involved, if not, indeed, the business in the individual contract, concerned the performance of work in or substantially affecting commerce.

Counsel for appellee, with some obvious glee, adopt appellant's assertion that the instructions as to commerce became the law of the case for want of objection by either party (Appellee's brief, page 2). If appellee now adheres to that position he is foreclosed from relying on the commerce of any person other than himself for the court's instruction was: "The plaintiff has the burden of proving by a preponderance of the evidence, (1) that the plaintiff was engaged in business and that this business included transactions in interstate commerce or transactions which materially affected interstate commerce" (Tr. 201). But appellee does not point out in his brief any proof of commerce of appellee's business on which a verdict could be based nor does that postion seem to be argued.

Appellee's efforts to latch on to the commerce of the general contractor's business is likewise futile and for the same reasons. While it is established that the gen-

eral contractor himself sometimes engaged in interstate commerce, there was no proof that the enterprise here engaged in by the general contractor involved any interstate commerce. The use of the commerce of another as in the *Reed* case (*N. L. R. B. v. Reed* (9 Cir.) 206 F.2d 184) is based upon the situation where, in the language of this court, the "activities are a part of a single enterprise" which single enterprise would involve commerce.

Two other minor points mentioned by counsel for appellee in their brief on this point are notable only in passing.

(1) Counsel mentions the practice of the NLRB in the projection of short term business volume to cover a year's period (Appellee's brief, page 8). This is done by the Board for the purpose of applying the Board's discretionary yardsticks based upon a year's business and has no place in determining the jurisdictional minimums for the application of the Federal Act.

(2) Counsel mentions national defense (Appellee's brief, page 8). The Board has lowered its discretionary standard in cases where national defense is involved, but since the Act is based upon the commerce clause and not the war powers of Congress, jurisdiction is not sustainable where there is no commerce simply because the work is on a defense project. See *e.g., N. L. R. B. v. Stoller* (9 Cir.) 207 F.2d 305.

B. LEGALITY OF CONTRACT

Appellant welcomes the argument made by appellee at pages 12 to 18 of his brief that the contract here was

"legal." This appellant and its affiliated unions would gladly pay the judgment in this case in full if that came as a result of an authoritative ruling that the closed shop contract which it had carried over from pre-Taft-Hartley days maintained even a shadow of legality. Such contracts were, of course, not invalid prior to Taft-Hartley. They had been utilized for some eighty years by the building trades unions and were not lightly eliminated by virtue of the Taft-Hartley revisions. As a result, this appellant and its sister building trades unions have, through a course of litigation all too familiar to this court, been required to pay the penalties imposed for their illegality and their continued existence after the Taft-Hartey Act. The distinctions argued for by appellee are too tenuous to save the contract.

Naturally, the contract applies only to the employees in the bargaining unit to which it applies. Such is true of all collective bargaining agreements and the closed shop provisions are not rendered legal by virtue of the fact that some employees outside the bargaining unit may not be included within its terms or excluded from its discriminatory reach. Such argument avails nothing.

We agree with appellee that, at least as of the date of this brief, the reported decisions do not render illegal contracts requiring employment of personnel through the hiring hall of a union but in the same sentence and breath this contract requires the employer to "retain in its employ only members in continuous good standing in the unions" and furthermore to discharge forth-

with employees not in good standing in the union. There is no thirty-day waiting period and no "escape" period. The mere execution of such a contract is illegal. *N. L. R. B. v. Gottfried Packing Company, Inc.* (C.A. 2, 1954) 210 F.2d 772, 33 LRRM 2550, and see *N.L.R.B. v. Carpenters Union* (C.A. 9, 1953) 202 F.2d 516, 31 LRRM 2450.

Appellee simply fails to distinguish between a "closed shop" contract and one which merely requires the employer to obtain his employees through the Union hiring hall. In the latter case only is the discriminatory or non-discriminatory operation of the hall relevant.

The appellee, in addressing himself to the question of severability of the illegal contractual provision, relies upon the statement of the author of an annotation as to what the "majority" of cases hold without specifying any of the cases constituting the so-called "majority" he relies on. Even the numerical certification of the author of the article is in itself in some doubt because he fails to note the existence of the cases cited to the point in appellants' brief. The Article is relatively old, 1950, and some of these cases were decided after the article was written.

Even though illegality of the union security clause in a contract may be severable, and thus not fatal to an action based upon a breach of the wage and hour clauses of the contract such a holding would not be dispositive of this case where the breach is in the hiring process itself, concerning which subject the union security clause is directly involved. The ordinary union contract, *sans* closed shop, imports no obligation to furnish

employees. In *Association v. Westinghouse Electric Company,* 348 U.S. 439, 99 L.Ed. 510, at page 527, in a concurring opinion Justice Reed said, "The union does not undertake to do work for the employer or even to furnish workers." Where, however, as here, there is a closed shop contract requiring an employer to obtain his employees from a union, then undoubtedly there is a concomitant duty on the part of the union to furnish such employees. The court instructed the jury, without exception by appellant, that "The collective bargaining agreement in this case does impose an obligation upon the defendant union to supply and dispatch men to the plaintiff" (Tr. 203). We felt at the time of trial and feel now, that if the union required the employer to obtain his men from the union, the *quid pro quo* of that provision and that provision alone was an implied obligation to furnish men. Since the obligation does not exist, as pointed out by Justice Reed, in the absence of such a union security provision it must inhere in that provision. Thus the plaintiff's cause of action rests upon a claimed violation of an implied obligation growing out of the very section of the contract which is illegal and the question of severability should, therefore, be academic.

C. DAMAGES

Appellee here relies in large part upon a colloquy with the trial court. Counsel, in that conference, asked the court a number of questions about what counsel would be permitted to argue to the jury, including such things as whether he, counsel, could argue attorney's fees to the jury (Tr. 185). The trial court attempted to

assist counsel, perhaps improvidently. Now counsel argues that the appellant is bound by this colloquy, the same as it would be bound by the court's instructions if it failed to object thereto (Appellee's brief, page 231). The appellant was, of course, not required to, and would not have been permitted to, quarrel with the trial court because it disagreed with anything he said during colloquy. If such were the case, the bickering during the course of litigation would be endless. It suffices here to say that in those comments of the court to which appellant had the right and the duty to state its exceptions for the record, that is to say, the instructions given to the jury, no reference was made to any general item of damages other than that the plaintiff was to be allowed the actual damages by him sustained; to be placed as nearly as possible in the position he would have been had the contract been performed, but without any allowance for loss of future profits. In order to sustain this verdict, counsel is in effect arguing that the jury took into consideration an item for loss of business, which clearly under the authorities cited in appellant's opening brief he would not be entitled to, and which, if given to the jury as an allowable item by the instructions of the trial court, would have been error. This would put the appellant in the awkward and untenable position of accepting an illegal measure of damages by reason of failure to except to instructions which were, in fact, not given. Such a position cannot be supported by resort to counsel's failure to quibble with the trial court during a colloquy in chambers.

Appellee seeks to distinguish the *Ford Motor Com-*

pany case (*Ford Motor Company v. Mahone,* 205 F.2d 267) on the grounds that in that case there were specific facts and circumstances that occurred during the trial that gave rise to an excessive verdict (appellee's brief, page 29). Rather than being a difference, that precise similarity was the reason for the citation of that case in appellant's opening brief. While the facts and circumstances of pity and sympathy and/or prejudice are different, such do exist in both cases. In this case, the plaintiff's original action was principally one for conspiracy between the defendant union and several employers for violation of the anti-trust laws. Counsel said in his opening statement that they were putting the greater emphasis on the conspiracy cause of action (Tr. 150). The evidence, as is the case in conspiracy actions, covered a large field and many statements were rendered admissible by reason of the presence of additional defendants and the allegations of conspiracy that would otherwise have been inadmissible. At the time of the dismissal of the conspiracy action and the employer defendants appellant's counsel adverted to this situation and then observed his inability to segregate in a practicable manner, the admissible from the inadmissible at that stage of the trial, a statement with which the trial court concurred (See Tr. 181-182). The net result was that the jury heard a great amount of highly prejudicial and inflammatory evidence directed to a cause of action and defendants which were dismissed by the trial court. Under such circumstances, and in view of the rendering of the verdict in an amount at least four times in excess of any computable loss, the only appropriate remedy is a new trial.

CONCLUSION

Appellant renews the conclusion stated in its opening brief.

Respectfully submitted,

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